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No. 88-6438

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MAURICE J. KEENAN,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

Cases	Pages
Lowenfield v. Phelps 484 U.S. ___, 98 L.Ed.2d 568 (1988)	1,2,4
People v. Keenan 46 Cal.3d 478 (1988)	2

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Respondent's apparent contention that the California Supreme Court decided petitioner's case correctly in light of Lowenfield v. Phelps, 484 U.S. ___, 98 L.Ed.2d 568 (1988) is belied by the record.

First of all, as petitioner has already demonstrated (Pet. at 9-10, 15), unlike the situation in Lowenfield the trial judge in the instant case did "single out minority jurors" by his intemperate remarks and did "ascertain the actual split of the jurors." (Brief in Opp. at 16.) Respondent incorrectly attributes to petitioner the suggestion that "through hindsight, we now know the jury was divided 11 to 1 for death." (Brief in Opp. at 16 n. 4.) In fact, as the three dissenting justices on petitioner's state appeal recognized, the trial judge knew or reasonably should have known the jury was split 11 to 1. (Pet. at 9, 15.)

Moreover, respondent makes the same mistake as the state court majority in analyzing the trial judge's remarks in isolation from what was going on inside the jury room at the time. The issue before this Court, as it was in the California Supreme Court, is not simply the inappropriateness of the trial judge's behavior in light of his then-existing knowledge. The issue, instead, is whether petitioner's death verdict was unconstitutionally coerced in light of "the totality of applicable circumstances," People v. Keenan, 46 Cal.3d 478, 545 (1988) (Kaufman, J., dissenting), including "the 'facts' developed at the hearing on the new trial motion." (Brief in Opp. at 16 n. 4.) Respondent fails to explain how petitioner's claim could have been examined "in its context and under all the circumstances," Lowenfield, 98 L.Ed.2d at 577, when the state court essentially ignored that highly relevant portion of the record.

Respondent purports to find particular significance in the absence of a claim that petitioner's jury was told a life sentence would be imposed if they could not agree on a penalty verdict. (Brief in Opp. at 16.) This peculiar observation ignores this Court's warning in Lowenfield that "other" factual circumstances--i.e., those not present in Lowenfield--might "require a different conclusion" with respect to whether a penalty verdict was coerced. 98 L.Ed.2d at 579. As petitioner has shown, those "other" circumstances present in his case were in fact considerably more coercive than those found to pass constitional muster in Lowenfield. (Pet. at 9-12.) Thus, the "most significant" factor cited by respondent (Brief in Opp. at 16) is in reality a non-issue in this case.[1/]

Respondent's further contention that the petition should be denied out of deference to the California Supreme Court's analysis and conclusion is misplaced. (Brief in Opp. at 17.) The assertion that the state court took into consideration the entire record (an assumption vigorously disputed by the dissenting opinion, see Pet. at 9, 14-15) is irrelevant to the issuance of the writ. There is simply no dispute over the historical facts in petitioner's case; it is the state court's application (or nonapplication) of relevant federal constitutional principles to those undisputed facts which is at issue here. This Court is of course the ultimate arbiter of whether the state court properly resolved the federal constitutional issue presented. The further suggestion that the state court correctly decided the issue is especially dubious in the instant case where three justices sharply differed with both the analysis and the conclusion of the four justices in the majority.

Finally, respondent stresses the obvious in noting that, as in all cases, the facts of the state court cases cited by petitioner are "necessarily different" than ours. (Brief in Opp. at 17.) Contrary to respondent's assertion, however, there is indeed a "split in authority" (id.)--a constitutionally intolerable one--where a death judgment is affirmed in a case (petitioner's) in which coercion of the penalty verdict is, if anything, even more

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1/ In any event, in the absence of an instruction regarding the consequences of the jury's inability to reach a verdict, petitioner's jury had no way of knowing whether the penalty phase would be retried. It is reasonable to conclude that at least some of the jurors, in their ignorance, would have believed that a life sentence would automatically have been imposed.

apparent than in cases in other jurisdictions in which the death judgments were reversed.

Respondent's position that the California Supreme Court's decision should not be reviewed because it decided petitioner's case "on its own facts" (Brief in Opp. at 17) would, if adopted, render meaningless this Court's warning that a "different conclusion" than that reached in Lowenfield might be required under different factual circumstances. It would likewise undermine this Court's stated constitutional obligation to assure that a capital defendant receive "the uncoerced verdict" of his penalty jury. 98 L.Ed.2d at 579.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for Writ of Certiorari, the petition should be granted.

DATED: March 7, 1989

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that I have on this date served a copy of the Petition for Writ of Certiorari and Petitioner's Reply to Respondent's Brief in Opposition, by depositing the above in the United States Mail, postage prepaid and properly addressed to:

JOHN VAN de KAMP
Attorney General of the
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6000 State Building
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All parties required to be served have been served.

Dated this 7th day of March, 1989, at San Francisco, California.

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